INTERIOR BOARD OF INDIAN APPEALS

George Myers v. Muskogee Area Director, Bureau of Indian Affairs

32 IBIA 242 (06/24/1998)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

GEORGE MYERS
v.
MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-110-A Decided June 24, 1998

Appeal from the cancellation of a lease of Indian land and the assessment of damages under the lease.

Affirmed in part; vacated and remanded in part.

1. Contracts: Disputes and Remedies: Damages: Liquidated Damages--Indians: Leases and Permits: Violation/Breach: Damages

   A provision for liquidated damages in a lease of Indian land cannot be enforced if it is determined to be a penalty. In such a case, the landowner's recovery for a breach by the lessee is limited to actual damages.

APPEARANCES: James R. Rodgers, Esq., Blackwell, Oklahoma, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant George Myers seeks review of a February 25, 1997, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA) cancelling Lease Contract No. 47404 (the lease) for Osage Allotment No. 738. For the reasons discussed below, the Board affirms the Area Director's decision in part, vacates it in part, and remands the matter to the Area Director for further consideration.

Background

The lease is dated December 7, 1992, and was approved by the Superintendent, Osage Agency, BIA, on February 26, 1993. It is a grazing lease and has a ten-year term beginning December 15, 1992. Annual rent for the first five years was $520, except that $470 was to be deducted from the first year's rent, or possibly from each of the first five years' rent, for fencing materials and bulldozer work. Annual rent was to be renegotiated after the first five years. 1/

1/ The typed-in provision concerning the rental reduction is preceded by an asterisk and states: "$470.00 TO BE DEDUCTED FROM RENTAL PAYMENTS FOR FENCING MATERIALS & DOZER WORK." Only the first year's rent has a corresponding asterisk. However, the use of the plural "payments" in the provision suggests that deductions were to be made from more than the first

The lease includes a page containing 22 printed provisions. Provision 15 reads: "**ADDITIONS**.))Prior to execution of this lease, provision(s) number(s) 23, 24, 25 and 26 has (have) been added hereto and by reference is (are) made a part hereof." 2/

The additional provisions appear on a separate page and are typewritten. They provide:

> 23. Lessee to hire bulldozer - clear brush on all boundaries where new fence is to be constructed. ALL dozer work to be completed by December 31, 1994.
>
> Liquidated Damages for not clearing brush on fence line - $1,200.
>
> 24. Lessee to construct two (2) miles of new fence in the SE/4 Section 18, Township 22 North, Range 8 East. Fencing to consist of steel posts, spaced a maximum of 16.5' apart, four (4) strands of 12.5 gauge barbed wire. Corner and brace posts a minimum of 6"X8'. Fencing to be completed by December 31, 1994.
>
> Liquidated Damages for not completing fence as specified - $7,000.
>
> 25. Branch of Land Operations will provide the low-Volatile 2,4-D for spraying broadleaf weeds. The lessee will furnish the cost and/or labor for application of the chemical. Chemical to be applied in the spring of 1993 when weeds are actively growing.
>
> Liquidated Damages for not spraying weeds - $5.00 per acre.
>
> 26. Lessee will spray brush with Spike 20 P chemical in 1994, if chemical is furnished by Branch of Land Operations. The amount of acreage to be sprayed will be determined by the quantity available for distribution.

On March 1, 1996, the landowner reported to the Agency that the fencing called for by Provision 24 had not been completed. A BIA appraiser inspected the leased property and reported:

> The appraiser found a new fence on the north and east sides. Fencing was done on the south but materials were not new or of the quality outlined in the lease. A total of 1.5 miles of fencing was done. Two miles of fencing is required in the lease. Fencing was to be completed by December 31, 1994.

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fn. 1 (continued)
year's rent. From Appellant's arguments in this appeal, it appears likely that reductions were made in each of the first five years' rent.

2/ The numbers of the additional provisions are typewritten.

> Inspection of the fence built found noncompliance to standards outlined in the lease. A part of the east side was fenced with four wires, two of which are smooth, ie., have no barbs. The south fence line has four strands of barbed wire but one strand is old. About a quarter mile in the wires are tied to a tree for a line stretch post. This is not good fence building practice. From this point west the wires are not attached to the steel posts. Further west on the south line the lessee has cut trees down and used them for line posts. The posts are not treated and are not put deep enough into the ground. This type of fence will be down in about a year.

Appraiser's Mar. 14, 1996, Report.

On May 9, 1986, the Agency Realty Officer wrote to Appellant concerning the lease. He first stated BIA's concerns about Appellant's performance. He then discussed a meeting that had taken place on April 24, 1996, attended by Appellant, the landowner, and BIA staff. Concerning the meeting, he stated:

> [T]he clearing of the fence line and fence construction to be completed by May 8, 1996 were discussed in a final attempt to assist [Appellant] in completing all improvements as agreed. It was also agreed by all parties that [Appellant] would compensate the landowner $600.00 damages on or before May 1, 1996 for failure to clear the fence line by dozer; would complete the fence requirements (replace barbless wire with barbed wire; and use proper corner & brace posts instead of trees.)

Realty Officer's May 9, 1996, Letter at 1. He continued:

> It will be necessary that you show cause, in writing, on or before 20 days from the date hereof, as to why your lease should not be cancelled on account of violation. If we have not received written cause from you by the due date, we will have no choice but to automatically cancel the lease. These damages are considered payable regardless of whether or not the lease is cancelled.

Id. at 2.

Appellant attempted to make a partial payment in the amount of $50 on May 10, 1996. However, the Acting Superintendent returned the payment, stating: "Payment plans are not acceptable. [The lease] is being cancelled due to violation of Lease Provisions 23 and 24. Damages are considered payable in the full amount due (see lease - compensated damages) regardless of whether or not the lease is cancelled." Acting Superintendent's May 10, 1996, Letter.

Appellant wrote to the Agency on May 15, 1996, discussing a number of matters concerning the lease and pointing out that the Agency's May 9, 1996, and May 10, 1996, letters were inconsistent with each other in that the

May 9 letter had given him 20 days to show why his lease should not be cancelled and the May 10 letter purported to cancel the lease immediately.

The Realty Officer responded on May 22, 1996, agreeing that the May 10, 1996, letter was in error in purporting to cancel the lease immediately. He responded to a number of points raised by Appellant in his May 15, 1996, letter. He then stated:

> It, therefore, will be necessary that you show cause in writing, on or before May 31, 1996, as to why your lease should not be cancelled. If we have not received acceptable written cause from you by the due date, we will have no choice but to automatically cancel the lease. The liquidated damages imposed (in the estimated amount of $8,200.00 including the above mentioned $600.00) are considered due and payable regardless of whether or not the lease is cancelled.

Realty Officer's May 22, 1996, Letter at 2.

Appellant did not respond to the show cause demand. A BIA employee inspected the leased property on May 29, 1996, and found the fence still incomplete. He revisited the property on June 3, June 12, and June 20, 1996, each time observing cattle on the property which had not been there on earlier visits.

On June 14, 1996, the Superintendent cancelled the lease and required Appellant to pay $8,200 under Provisions 23 and 24 of the lease.

Appellant appealed to the Area Director who, on February 25, 1997, issued a decision affirming the Superintendent's decision in part, modifying it in part, and vacating and remanding it in part.

The Area Director affirmed the Superintendent's cancellation of the lease, noting that Appellant had failed to respond to the May 22, 1996, show cause letter. He modified the assessment of damages under lease Provision 23, stating:

> [T]he Superintendent's May 9, 1996, letter to you indicates that at a meeting held April 24, 1996, an agreement was reached which provided you would on or before May 8, 1996, compensate the landowner $600 for damages for failure to clear the fence line by dozer. We assume the agreement reached is as stated since you have not disputed the Agency statements concerning the terms of the agreement nor provided any evidence to the contrary. The apparent existence of such an agreement is also evidenced by your payment on May 8, 1996, of $50 to the landowner as "partial on fine for grass lease," and your letter of May 15, 1996, to the Agency references the "$600 I am to pay [the landowner] on my return from Illinois trip . . . I will pay this as soon as possible." The Superintendent has taken the position that the measure of damages in the entire amount specified as liquidated

> damages ($1,200) for failure to complete Requirement No. 23 as specified. The Superintendent, however, fails to take into consideration the value of the clearing work which was completed. Collecting the total amount of damages in addition to benefitting from the value of the work completed would amount to an unjust enrichment to the lessor. The Superintendent's decision regarding the amount of damages due for non-compliance with Lease Provision No. 23 is, therefore, modified to conform to the earlier agreement of the parties which appeared to give the lessor [sic, should be lessee] credit for the work completed and provided for compensation to the landowner in the amount of $600 for failure to clear the fence line by dozer.

Area Director's Decision at 2-3.

With respect to the assessment of $7,000 in damages under lease Provision 24, the Area Director stated:

> The record does contain evidence that approximately 1 1/4 to 1 1/2 miles of fencing was constructed, although there is apparent disagreement as to compliance to the standards set forth in the lease, i.e., barbless/barbed wire and proper corner and brace posts. The Superintendent again has taken the position that the measure of damages is the entire amount specified as liquidated damages ($7,000) for not completing Requirement No. 24. Failing to take into consideration the value of the fencing which was completed in addition to collecting the total amount of damages would again result in an unjust enrichment to the lessor. Therefore, the decision of the Superintendent regarding the amount of damages for non-compliance with Provision No. 24 is vacated and is being remanded for a determination of the value of the fencing completed to be offset against the $7,000 claimed.

Id. at 3-4.

Appellant appealed the Area Director's decision to the Board. Only Appellant filed a brief.

Discussion and Conclusions

On appeal to the Board, Appellant contends that "[t]here are two legal issues involved in this appeal." Appellant's Opening Brief at 1. The first issue Appellant raises concerns the page of the lease on which Provisions 23, 24, 25, and 26 appear. Appellant contends that this page is not properly part of the lease because it was not signed by Appellant but only by a BIA employee in the Branch of Land Operations, and was not signed by that employee until December 17, 1992, ten days after the date of the lease.

Appellant made this contention before the Area Director, who responded:

> The page of the lease containing the added provisions does not reflect that you initialled or surnamed same, however, the

> Superintendent's letter of May 22, 1996, indicates you were furnished a copy of the lease on or about February 26, 1993, which copy should have contained the referenced provisions. Item 15 of the lease document you signed also references the fact that Provision Nos. 23, 24, 25 and 26 were added and made a part thereof. The date on the page containing the additional lease provisions appears to be the date on which the Agency Branch of Land Operations personnel indicated their concurrence, particularly as to Provisions 25 and 26 as relates to their involvement with the furnishing of spray and chemicals for weed and brush control.

Area Director's Decision at 3.

As the Area Director stated, Provision 15 specifically incorporates Provisions 23-26 into the lease and states that those paragraphs were added prior to execution of the lease. Appellant does not claim that the page containing Provision 15 was not a part of the lease. Thus, Appellant evidently concedes that the statement in Provision 15 incorporating Provisions 23-26 is properly a part of the lease.

In addition to the explicit reference in Provision 15, a reference to the subject matter of Provisions 23 and 24 appears in the special rental provision on page 1 of the lease, allowing for a reduction in Appellant's rent for "FENCING MATERIALS & DOZER WORK." It is evident that this rent reduction was allowed in recognition of the requirements imposed on Appellant by Provisions 23 and 24.

Appellant cannot claim to have been unfamiliar with the terms of Provisions 23-26. His written communications with the Agency show that he was well acquainted with them. See, e.g., Appellant's May 15, 1996, letter to the Agency. Further, Appellant clearly benefitted from the additional provisions, particularly in having his rent reduced and in being provided with weed spray under Provision 25. 3/

In any event, Appellant was responsible for reviewing the copy of the lease he received from BIA following the Superintendent's approval of the lease in February 1993. If the lease provisions did not agree with his recollection of the agreement of the parties, Appellant was responsible for bringing the matter to BIA's attention.

The Board finds that, through his actions, Appellant has acknowledged that Provisions 23-26 are a part of his lease. The Board therefore rejects Appellant's contention to the contrary.

Appellant's second contention is that the liquidated damages clauses in Provisions 23 and 24 are actually penalties and therefore unenforceable.

3/ In his May 15, 1996, letter, Appellant acknowledged receiving 10-15 gallons of the spray.

In connection with this argument, Appellant also contends that the parties agreed that the damages to be paid in the event Appellant failed to complete the work required by Provisions 23 and 24 would be $2,350, or five times $470 (the amount of Appellant's rent reduction). From this amount, Appellant contends, $600 (the amount Appellant agreed to pay under Provision 23) must be deducted, leaving $1,750. Finally, Appellant contends, the value of the fence actually constructed must be deducted from $1,750, to find the amount now owed by Appellant.

In essence, Appellant postulates a different liquidated damages provision than the ones stated in the lease and then seeks to have deductions taken from the amount of liquidated damages he postulates. 4/ The Board need not spend time with this argument. Appellant's contention that the parties agreed to liquidated damages in the amount of $2,350 is in conflict with the terms of the lease. Accordingly, the Board rejects it.

Appellant's more serious argument is that the liquidated damages clauses in Provisions 23 and 24 are penalties and thus not enforceable against him.

[1] It is well established that a contract provision calling for payment of a sum upon breach of the contract is invalid and unenforceable if it is determined to be a penalty rather than a provision for liquidated damages. E.g., Restatement (Second) of Contracts § 356 (1981); 5 Samuel Williston, A Treatise on the Law of Contracts, §§ 776 (3rd ed. 1961); 5 Arthur Linton Corbin, Corbin on Contracts § 1057 (1964); 22 Am. Jur. 2d Damages § 686 (1988); 25 C.J.S. Damages § 101 (1966). Thus, if a contract provision is found to be a penalty, recovery is limited to actual damages. E.g. Watts v. Camors, 115 U.S. 353 (1885); 22 Am. Jur. 2d Damages § 727. The fact that a sum is called "liquidated damages" in the contract is not conclusive as to its character. Rather, a court must determine whether the sum is truly liquidated damages or whether it is a penalty. E.g., Williston at §§ 776, 784; 22 Am. Jur. 2d Damages at §§ 694, 695.

Certain rules have developed to guide the determination as to whether a particular stipulated sum is for a penalty or for liquidated damages. E.g., Williston at § 784; 22 Am. Jur. 2d Damages at § 690. One of those rules is that "a stipulated sum will be regarded as a penalty where the defaulting party is rendered liable for the same amount whether the breach is total or partial, or where the sum is set without regard to the extent of performance where, in the nature of the promises, the extent of performance would be important in determining the amount of actual damages which would result."

4/ Inconsistently, Appellant contends that the Area Director's decision to allow an offset against the amount of liquidated damages stated in the lease is evidence that the liquidated damages provision was improper in the first instance. With respect to the Area Director's decision, he contends: "It would not be appropriate to give credit against a liquidated damage provision. If a credit can be determined, it would mean that the actual damages could be determined." Appellant's Opening Brief at 4.

22 Am. Jur. Damages at § 693. See also Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947); Watts v. Camors, supra; Williston at § 784; Corbin at § 1066. Even if the amount of such a stipulated sum may be regarded as liquidated damages in the case of a total breach, it may still be a penalty in the case of a partial breach if it does not bear any relation to the amount of damage that would result from a partial breach. 25 C.J.S. Damages § 110.

Appellant appears to direct his arguments equally to the liquidated damages clauses in Provisions 23 and 24. Because there is an additional consideration to be taken into account in the case of Provision 23, the Board first addresses Provision 24.

As Appellant contends, the liquidated damages clause in Provision 24 does not distinguish between total and partial breach but, rather, purports to make Appellant liable for the same amount regardless of the extent of his performance. The Superintendent found him liable for the entire amount, despite his partial performance. The Area Director found that result unfair and attempted to cure the problem by providing for an offset to cover the value of the fence Appellant had constructed. However, if this liquidated damages clause is actually a penalty, the Area Director's attempted cure does not solve the problem because, under the principles discussed above, the clause cannot be enforced at all, and a determination of actual damages must be made.

The Board finds that the liquidated damages clause in Provision 24, at least as applied to a partial breach such as this one, is a penalty because it purports to make Appellant liable for the same sum regardless of the degree to which he had performed under the contract. Accordingly, the Board vacates the Area Director's decision as to that clause and remands the matter to him for a determination of actual damages to the landowner. The Area Director may make the determination himself or may direct the Superintendent to make the determination.

In general, the measure of damages for the breach of a contract relating to Indian trust or restricted lands is that amount of money which will place the owner is as good a position as he/she would have been in had the contract been fully performed. Kombol v. Assistant Portland Area Director, 21 IBIA 116 (1991). In this case, the landowner was entitled to have a fence constructed in accordance with the terms of Provision 24. Thus the amount of damages would be the amount it would take to bring the fence constructed by Appellant into compliance with that provision, plus any damages the landowner may have suffered by reason of the failure of Appellant to complete the fence by December 31, 1994. 5/

The liquidated damages clause in Provision 23, as originally written, would be subject to the same objections as the one in Provision 24, in that it fails to take partial performance into account. However, in this case,

5/ It is not clear from the record when Appellant constructed the fence. The first inspection shown in the record took place on Feb. 29, 1996.

the parties reached agreement, at a time when Appellant was already in partial breach of Provision 23, to allow a payment by Appellant in the amount of $600 (or half the amount called for in Provision 23). This agreement is most reasonably seen as the settlement of a contract dispute that had arisen under Provision 23.

The Board sees no reason why this settlement agreement should not be enforced. Accordingly, the Board affirms the Area Director's decision with respect to Provision 23.

Appellant's arguments in this appeal have been directed to the assessment of damages against him, rather than to the cancellation of his lease. It appears likely, therefore, that he has abandoned his appeal of the lease cancellation. Even if he did not intend to abandon his appeal of the cancellation, he has made no showing of error in the Area Director's decision insofar as i t affirmed the cancellation of Appellant's lease. Accordingly, the Board affirms the cancellation of Appellant's lease.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's February 25, 1997, decision is affirmed as to the cancellation of Appellant's lease and the assessment of $600 under Provision 23 of the lease. The decision is vacated as to the assessment of damages under Provision 24, and the matter is remanded to the Area Director for further consideration.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge